

MOHD YUSRI AB HAMID v. PP**A**

COURT OF APPEAL, PUTRAJAYA

BALIA YUSOF WAHI JCA

ROHANA YUSUF JCA

ZAKARIA SAM JCA

[CRIMINAL APPEAL NO: K-05-296-11-2012]

B

27 OCTOBER 2014

CRIMINAL PROCEDURE: Appeal – Finding of fact by trial judge – Appeal against conviction – Whether correct finding of fact made – Whether there was misdirection – Whether appellate intervention warranted – Whether safe to uphold conviction

C

EVIDENCE: Adverse inference – Failure of prosecution to call witness – Whether prosecution bound to call everyone involved to testify – Whether failure to call merited invocation of adverse inference – Whether persons named necessary to unfolding of narratives of prosecution's case – Evidence Act 1950, s. 114(g)

D

EVIDENCE: Agent provocateur – Admissibility of evidence – Roles of – Whether to be determined by court – Whether failure to call superior officer to testify on roles of agent provocateur would attract adverse inference – Whether evidence of agent provocateur admissible

E

EVIDENCE: Agent provocateur – Informer – Role of informer – Whether assumed mantle of agent provocateur – Whether lost protection from disclosure of identity – Whether failure to call would attract adverse presumption – Dangerous Drugs Act 1952, s. 40 – Evidence Act 1950, s. 114(g)

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SP4, an agent provocateur, upon receiving instructions from his senior officer, DSP Zainuddin, to act as an undercover, met with the informer and was told that a male Malay named Halim was selling drugs in the area. SP4 then met with Halim who told him to get in touch with one Let ('the appellant'), whom SP4 later met and discussed about the sale of drugs. SP4, upon invitation by the appellant, went to the appellant's house with the informer for further discussion about the drugs. Subsequently, the appellant was arrested by an ambush party led by Insp. Samsualan Samsudin ('SP2') at the Gurun Toll Plaza. A plastic packet containing two transparent plastics containing substances suspected to be drugs were found in the basket of the motorcycle of the appellant. Upon analysis, the two plastic packets were found to contain 50.29g of heroin and 4.31g of monoacetylmorphine. The appellant was charged for trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). He was found guilty, convicted and sentenced to death by the Judicial Commissioner ('JC') and hence, this appeal. The grounds raised in the present appeal were, *inter alia*: (i) as to the identity of the drugs; and (ii) on the non-calling of material witnesses.

G**H****I**

A Held (allowing appeal; setting aside conviction and sentence)**Per Balia Yusof Wahi JCA delivering the judgment of the court:**

- B** (1) Considering the evidence, in particular the evidence of the chemist ('SP3') and the investigating officer ('SP5'), there was no doubt as to the identity of the drugs. It was the same drugs that was seized from the appellant's motorcycle, analysed by SP3 and later produced in the court. The JC had deliberated on exh. D14 (Borang Polis 31) and had accepted the evidence of SP2, SP3 and SP4 as to the place of the finding of the drugs and there was no basis to disturb the finding. Hence, there was no merit in the submissions on this issue. (paras 16-18)
- C** (2) SP4 was an agent provocateur and the law recognises the roles of the agent provocateur and declares the evidence of an agent provocateur as admissible. Whether SP4 was an agent provocateur or an accomplice was an issue to be determined by the court and not by DSP Zainuddin. In the circumstance, the submission that only by calling DSP Zainuddin it could be determined whether SP4 was an agent provocateur was unmeritorious and erroneous. (para 24)
- D** (3) It was not necessary for the prosecution to call everybody involved in the case to prove its case against the appellant as the prosecution has a complete discretion as to the choice of witnesses to be called at the trial. The failure by the prosecution to call the named persons in this case did not merit the invocation of the presumption under s. 114(g) of the Evidence Act 1950 as it did not smack any oblique motive or any suppression or withholding of evidence on the part of the prosecution. The persons named were not necessary or essential to the unfolding of the narratives of the prosecution case. (paras 28 & 29)
- E**
- F**
- G** (4) The informer was together with SP4 and the appellant during all the meetings and discussions that went on between SP4 and the appellant. The JC's finding that the role of the informer was only to introduce SP4 to the accused, was against the evidence proffered. The informer played an active role without whose participation the appellant would have never been caught. The informer, having regard to her role was not a mere informer, but had assumed the mantle of an agent provocateur. The identity of the informer was no longer a secret, and thus she had lost the protection from disclosure of identity accorded to informers under s. 40 of the DDA. Once an informer falls under the category of an agent provocateur, any failure to call him as a witness may attract the adverse presumption under s. 114(g). (paras 32 & 38)
- H**
- I** (5) Where an explanation is given by an accused person, which is consistent with innocence, the court must consider whether it might reasonably be true even though the court is not convinced of its truth. In the light of the evidence of SP4 about the informer, it was probable that the informer was at the toll plaza on the day of the incident. Therefore the appellant's story was not a bare denial. (para 48)

- (6) In a criminal trial, there is no burden on an accused person to call all witnesses and no adverse inference can be drawn against the defence for failure to call witnesses. The JC had placed a burden on the appellant and had also drawn adverse conclusions against the appellant for failing to call the witnesses offered by the prosecution, which was a misdirection. (paras 50 & 51) A
- (7) The JC had not taken proper advantage of her enviable position of having seen and heard the witnesses and such failure had put the matter at large for the court to peruse and dissect the facts and the law based on the appeal records. The erroneous finding of fact made by the JC on the role of the informer and her failure to draw an adverse presumption under s. 114(g) of the Evidence Act 1950 was a serious misdirection and merited intervention. This was a fit and proper case for appellate intervention and the court found that it was unsafe to uphold the conviction of the appellant. The appellant was therefore acquitted and discharged. (paras 41 & 42) B
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- D

Bahasa Malaysia Translation Of Headnotes

SP4, seorang ejen perangkap, selepas menerima arahan daripada pegawai atasannya, DSP Zainuddin, untuk bertindak sebagai penyamar, bertemu dengan sumber dan diberitahu bahawa seorang lelaki Melayu bernama Halim menjual dadah di kawasan tersebut. SP4 kemudian berjumpa dengan Halim yang memberitahunya untuk bercakap dengan seorang bernama Let ('perayu') yang SP4 kemudiannya bertemu dan berbincang mengenai jualan dadah. SP4, atas jemputan perayu, pergi ke rumah perayu dengan sumber untuk berbincang lanjut mengenai dadah tersebut. Selepas itu, perayu telah ditangkap oleh satu pasukan serbuan yang diketuai oleh Insp. Samsualan Samsudin ('SP2') di Plaza Tol Gurun. Sebuah beg plastik yang mengandungi dua plastik lutsinar yang mengandungi bahan-bahan yang disyaki dadah dijumpai dalam bakul motorsikal perayu. Selepas analisa, kedua-dua bungkusan plastik tersebut didapati mengandungi 50.29g heroin dan 4.31 monoacetylmorphine. Perayu dituduh bagi pengedaran dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Dia didapati bersalah, disabitkan dan dijatuhkan hukuman mati oleh Pesuruhjaya Kehakiman ('PK') dan dengan itu, rayuan ini. Alasan-alasan yang dibangkitkan dalam rayuan ini adalah, antara lain, berkaitan dengan: (i) identiti dadah; dan (ii) kegagalan memanggil saksi-saksi penting. E

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**Diputuskan (membenarkan rayuan; mengenyepikan sabitan dan hukuman)
Oleh Balia Yusof Wahi HMR menyampaikan penghakiman mahkamah:**

- (1) Mempertimbangkan keterangan, khususnya keterangan ahli kimia ('SP3') dan pegawai penyiasat ('SP5'), tidak ada keraguan mengenai identiti dadah tersebut. Ia adalah dadah yang sama yang dirampas dari motorsikal perayu, dianalisa oleh SP3 dan kemudian dikemukakan di mahkamah. PK telah menimbangkan exh. D14 (Borang Polis 31) dan I

- A telah menerima keterangan SP2, SP3 dan SP4 mengenai tempat penemuan dadah tersebut dan tidak ada asas untuk mengganggu penemuan tersebut. Dengan itu, tidak ada merit dalam penghujahan mengenai isu ini.
- B (2) SP4 adalah ejen perangkap dan undang-undang mengiktiraf peranan ejen perangkap dan mengisytiharkan keterangan ejen perangkap sebagai boleh diterima. Sama ada SP4 adalah ejen perangkap atau rakan subahat adalah isu yang perlu ditentukan oleh mahkamah dan bukan DSP Zainuddin. Dalam keadaan tersebut, hujahan bahawa hanya dengan memanggil DSP Zainuddin boleh ditentukan sama ada SP4 adalah ejen perangkap adalah tidak bermerit dan khilaf.
- C (3) Adalah tidak perlu bagi pihak pendakwaan memanggil kesemua yang terlibat dalam kes tersebut untuk membuktikan kesnya terhadap perayu kerana pihak pendakwaan mempunyai budi bicara mutlak tentang pilihan saksi-saksi yang hendak dipanggil dalam perbicaraan. Kegagalan pihak pendakwaan memanggil orang yang dinamakan dalam kes ini tidak mewajarkan pembangkitan anggapan di bawah s. 114(g) Akta Keterangan 1950 kerana ia tidak menghalang apa-apa motif salah atau apa-apa penghalangan atau penahanan keterangan pada pihak pendakwaan. Orang-orang yang dinamakan adalah tidak perlu atau penting untuk mendedahkan naratif kes pihak pendakwaan.
- E (4) Sumber berada bersama-sama dengan SP4 dan perayu semasa kesemua pertemuan dan perbincangan antara SP4 dan perayu. Dapatan PK bahawa peranan sumber hanya untuk memperkenalkan SP4 kepada tertuduh, adalah bertentangan dengan keterangan yang dikemukakan.
- F Sumber memainkan peranan aktif yang tanpa penglibatannya perayu tidak mungkin ditangkap. Sumber, mempertimbangkan peranannya, adalah bukan sumber semata-mata, tetapi telah memainkan peranan ejen perangkap. Identiti sumber bukan lagi rahsia, dan dengan itu dia telah kehilangan perlindungan daripada pendedahan identiti yang diberikan kepada sumber di bawah s. 40 ADB. Sebaik sahaja sumber terangkum dalam kategori ejen perangkap, apa-apa kegagalan untuk memanggilnya sebagai saksi boleh membangkitkan anggapan bertentangan di bawah s. 114(g).
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- H (5) Di mana suatu penjelasan diberikan oleh orang tertuduh, yang adalah konsisten dengan ketidakbersalahan, mahkamah wajar mempertimbangkan sama ada ia mungkin benar walaupun mahkamah tidak yakin dengan kebenarannya. Berdasarkan keterangan SP4 mengenai sumber, adalah berkemungkinan bahawa sumber berada di plaza tol tersebut pada hari kejadian. Oleh itu cerita perayu bukanlah penafian semata-mata.
- I (6) Dalam perbicaraan jenayah, tidak ada beban di atas tertuduh untuk memanggil kesemua saksi dan tidak ada anggapan bertentangan yang boleh dibangkitkan terhadap kegagalan memanggil saksi-saksi. PK telah

- meletakkan beban ke atas perayu dan juga telah membangkitkan kesimpulan bertentangan terhadap perayu kerana gagal memanggil saksi yang ditawarkan oleh pendakwaan, yang merupakan satu salah arahan. A
- (7) PK tidak mengambil kesempatan yang sewajarnya dengan kedudukannya yang telah melihat dan mendengar keterangan saksi dan kegagalan sedemikian telah meletakkan perkara tersebut terbuka bagi mahkamah menilai dan mempertimbangkan fakta-fakta dan undang-undang berdasarkan rekod-rekod rayuan. Dapatan fakta yang salah oleh PK mengenai peranan sumber dan kegagalannya membangkitkan anggapan bertentangan di bawah s. 114(g) Akta Keterangan 1950 adalah salah arahan serius dan mewajarkan campur tangan. Ini adalah kes yang sesuai bagi campur tangan rayuan dan mahkamah mendapati bahawa adalah tidak selamat untuk mengekalkan sabitan perayu. Perayu adalah dengan itu dilepaskan dan dibebaskan. B C

Case(s) referred to:

- Abu Bakar v. Regina* [1963] 1 LNS 4 HC (*refd*) D
- Adel Muhammed El Dabbah v. AG for Palestine* [1944] AC 156 (*refd*)
- Andy Bagindah v. PP* [2000] 3 CLJ 289 CA (*refd*)
- Emperor v. Chaturbhuj Sahu* ILR [1911] 38 Cal 96 (*refd*)
- Goh Ah Yew v. PP* [1948] 1 LNS 13 HC (*refd*)
- Gunalan Ramachandran & Ors v. PP* [2006] 1 CLJ 857 FC (*refd*)
- Hari Bhadur Ghale v. PP* [2012] 7 CLJ 789 FC (*refd*) E
- Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945 FC (*refd*)
- Illian & Anor v. PP* [1988] 1 LNS 139 SC (*refd*)
- Kamalahassan Latchiman v. PP* [2008] 4 CLJ 794 CA (*refd*)
- Mat v. PP* [1963] 1 LNS 82 HC (*refd*)
- Mohd Za'ba Abdul Talib & Anor v. PP* [2013] 4 CLJ 1081 CA (*refd*)
- Munusamy Vengadasalam v. PP* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC (*refd*) F
- Namasiyam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC (*refd*)
- Osman Khan v. PP* [1948] MLJ 56 (*refd*)
- Pie Chin v. PP* [1983] 1 CLJ 316; [1983] CLJ (Rep) 703 HC (*refd*)
- PP v. Datuk Haji Harun Haji Idris* (No. 2) [1976] 1 LNS 184 FC (*refd*)
- PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233 FC (*refd*) G
- Samugen Pakri & Ors v. PP* [2012] 1 CLJ 937 CA (*dist*)
- Seneviratne v. R* [1936] 3 All ER 36 (*refd*)
- Tan Foo Su v. PP* [1967] 1 LNS 179 HC (*refd*)
- Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 FC (*refd*)
- Wan Mohd Azman Hassan v. PP* [2010] 4 CLJ 529 FC (*refd*)
- Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17 FC (*refd*) H

Legislation referred to:

- Dangerous Drugs Act 1952, ss. 39B(1)(a), 40A
- Evidence Act 1950, s. 114(g)

- A *For the appellant - Amy Ling Huoy Yi; M/s Lim Chong Phang & Amy
For the respondent - Nadia Hanim Mohd Tajuddin; DPP*

[Editor's note: For the High Court judgment, please see PP v. Mohd Yusri Ab Hamid [2013] 1 LNS 147.]

- B *Reported by S Barathi*

JUDGMENT

Balia Yusof Wahi JCA:

- C [1] The appellant was charged for trafficking in dangerous drugs, to wit, 50.29g of heroin and 4.31g of monoacetylmorphine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"). He was found guilty, convicted and sentenced to death. Hence this appeal.

- D [2] We heard the appellant's appeal on 11 October 2013. We set aside the conviction and sentence passed by the learned Judicial Commissioner ("JC"), acquitted and discharged him of the offence charged and set him free.

Facts

- E [3] On 22 January 2011, Insp Samsualan Samsudin ("SP2") attended a briefing held by his senior officer in respect of a drug trafficking activity during which an agent provocateur, SP4 was introduced to him. After the briefing, SP2 and his team of officers went to the Gurun toll plaza and carried out a surveillance in the parking area. SP2 and his team were waiting inside a car while SP4 was waiting inside another car.

- F [4] SP4 was later seen coming out and stood behind the rear of the car. A while later, SP2 saw a man (later identified as the appellant) coming on a motorcycle towards SP4 and stopped his motorcycle beside SP4 and was seen talking to SP4. SP2 then saw SP4 touched his head as an indication to the ambush party to strike. On seeing the signal, SP2 and his team rushed towards the appellant and identified himself as police officer. The appellant
G struggled and tried to escape but SP2 and his team managed to arrest him.

- H [5] A plastic packet with the words 'HUP SENG CREAM CRACKER' (P11) was found in the basket of the motorcycle. Inside P11, were two transparent plastics (P12A & P12B) containing substances suspected to be drugs. The items were seized.

- [6] The two plastic packets were sent to the chemistry department for analysis and found to contain 50.29g heroin and 4.31g monoacetylmorphine.

- I [7] Prior to the briefing on 22 January 2011, SP4 states that on 22 December 2010 he had received instructions from his senior officer one DSP Zainuddin to act as an undercover. The target was a male Malay named Halim. The next day on 23 December 2010 SP4 met with the informer (whom he referred to as sumber) and was told that a male Malay named

Halim was selling drugs in the area. Later in the day SP4 met Halim and Halim told SP4 to get in touch with his boss named Let. Halim gave SP4 Let's phone number.

[8] On 24 December 2010 SP4 called Let (later identified as the appellant) and they decided to meet at kedai Tom Yam Kak Yah. There, they discussed about the sale of drugs and the appellant told SP4 that the drugs cost RM13,000 per pound. There was some bargaining over the price but SP4 was unable to get any reduction in the price. SP4 was also invited by the appellant to come to his house with the informer.

[9] On 26 December 2010 SP4 and the informer went to the appellant's house for further discussions about the drugs. SP4 was told that he would be contacted when the drug was ready for delivery. The informer was present together but according to SP4, the informer was not involved in the discussion.

The Appeal

[10] Three grounds of appeal were canvassed before us. They are as follows:

- (i) Identity of the drugs;
- (ii) Non calling of material witness; and
- (iii) Contradictions in the prosecution witnesses' evidence.

Identity Of The Drugs

[11] It was the appellant's contention that there is a serious doubt as to the identity of the drugs. Exhibit D14 (Borang Polis 31) was put in by the defence when SP3 gave evidence. Exhibit D14 was received by SP3 (the chemist) from SP5 (the investigating officer) on 24 January 2011. At p. 2 of D14 it was stated as follows:

Butir-butir borang kes

Tarikh dan masa didapati oleh Polis: 28/07/09

Bagaimana dan dimana dijumpai: Atas jalan

[12] Learned counsel for the appellant submitted that the entry in exh. D14 contradicts the oral testimony of SP2, SP4 and SP5 who all said that the drugs were seized by the police on 22 January 2011 and were found in the basket of the motorcycle (P15). Because of this, it was submitted that there is a serious doubt as to the identity of the drugs.

[13] When SP3 gave evidence, she stated that inside the envelope accompanying exh. D14, two plastic packets were found in another plastic packet with the words 'HUP SENG CRACKER'. Inside the two plastic packets were found substances which on analysis she found it to be containing 50.29g of heroin and 4.31g of monoacetylmorphine. The plastic

A packets had a date written on it 22 January 2011 and a signature. She received the exhibits from SP5 on 24 January 2011 at about 2.16pm and gave SP5 an acknowledgement receipt, exh. P8.

B [14] The investigating officer (“SP5”) testified that he sent the exhibits to SP3 together with exh. D14 which he prepared. He also stated the plastic packets were put in an envelope which was dated, with the Gurun Report number, investigation paper number and his name. SP5 also confirmed that he received the drugs on 22 January 2011. In respect of exh. D14, SP5 was never cross-examined by the appellant’s counsel.

C [15] The learned Deputy Public Prosecutor (“DPP”) submitted that there was no break in the chain of evidence in respect of the drugs. The learned DPP had also prepared the chronology of events relating to the drugs in her written submissions which we reproduce below.

D	Tarikh	Keterangan	Rujuk
E	22 January 11 @ 3pm	Pasukan serbuan menahan perayu dan barang kes P11, P12A & P12B dirampas oleh SP2.	ms. 25, 26
F	7.50pm	SP2 menyerahkan kepada pegawai penyiasat SP5 dan SP5 telah simpan barang kes dalam cabinet berkunci.	ms. 26 ms. 75
G	23 November 11 @ 9 am	SP5 telah arahkan SP1 mengambil gambar barang kes dan SP5 telah simpan semula dalam cabinet berkunci.	ms. 16 ms. 76
H	24 January 11	SP5 telah hantar ke Jabatan Kimia diterima oleh SP3 dan telah di dalam simpanan dan kawalan SP3.	ms. 76 ms. 41
I	19 May 11	SP3 telah serah semula kepada SP5 selepas selesai analisis kimia dan disimpan dalam cabinet berkunci.	ms. 77, ms. 43
	22 May 11	Barang kes disimpan dan didaftar dalam stor barang kes.	ms. 78

[16] Considering the evidence, in particular the evidence of SP3 and SP5 we are in agreement with the learned DPP that there is no doubt as to the identity of the drugs. It was the same drugs that was seized from the appellant's motorcycle, analysed by the chemist and later produced in court. (*Hasbala Mohd Sarong v. PP* [2013] 6 CLJ 945; [2013] MLJU 1057, *Gunalan Ramachandran & Ors v. PP* [2006] 1 CLJ 857; [2006] 2 MLJ 197).

[17] The learned JC had deliberated on D14 in her judgment at p. 134 of the appeal record and had accepted the evidence of SP2, SP3 and SP4 as to the place of the finding of the drugs. We are reluctant and indeed we have no basis to disturb that finding.

[18] On that note, we do not find any merit in the submissions of the appellant's learned counsel on this issue.

Non-Calling Of Material Witness

[19] Learned counsel submitted that the prosecution ought to have called one DSP Zainuddin and the informer Kak Nor/Kak Na as witnesses. Besides the two, there were three other persons named Roslin, Halim and the owner of the motorcycle.

[20] DSP Zainuddin was the senior police officer who gave the briefing about an alleged drug trafficking activity in the Gurun area. During the briefing SP4 was introduced to SP2 as an agent provocateur. According to counsel, without the evidence of DSP Zainuddin, the court could not determine whether SP4 was in fact an agent provocateur or an accomplice.

[21] We have perused the evidence of SP4 and SP2 and we do not find any substance in the submissions of learned counsel. SP4 had received instructions from DSP Zainuddin to act as an undercover and from there he started meeting the informer the next day ie, 23 December 2010 and later getting in touch with the appellant, meeting him and negotiated on the purchase of the drugs. We have also considered the evidence of SP2 on the role played by SP4 as to the deal which took place at the Gurun toll plaza, the scene of the incident.

[22] Who an agent provocateur is has been lucidly explained in *Wan Mohd Azman Hassan v. PP* [2010] 4 CLJ 529; [2010] 4 MLJ 141 where, at p. 538 (CLJ) and p. 148 (MLJ), the Federal Court has defined an agent provocateur as:

[10] ... one who provokes or suggests the commission of an offence to another person hoping that the latter will go along with his suggestion so that the other person may be convicted of the offence the agent provocateur suggested ...

- A [23] In the said case, the Federal Court also explain the distinction between an agent provocateur and an accomplice, quoting with approval a passage in *Emperor v. Chaturbhuj Sahu* [1911] ILR 38 Cal 96:

- B [10] A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence, either before associating with wrong-doers or before the actual perpetration of the offence, is not an accomplice but a spy, detective or decoy whose evidence does not require corroboration, though the weight to be attached depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission is an accomplice requiring corroboration.
- C

(See also *Hari Bhadur Ghale v. PP* [2012] 7 CLJ 789)

- D [24] We are satisfied that SP4 was an agent provocateur and the law recognises the roles of the agent provocateur and declares the evidence of an agent provocateur as admissible: (s. 40A DDA). Whether SP4 is an agent provocateur or an accomplice is an issue to be determined by the court and not by DSP Zainuddin. We do not agree with learned counsel that only by calling DSP Zainuddin can determine whether SP4 is an agent provocateur. In this respect, we find not only the submission of learned counsel to be unmeritorious but also erroneous.
- E

[25] The next witness whom the prosecution was alleged to have failed to call was one Roslin who was working at the toll booth on the day of the incident. Roslin was said to have witnessed the arrest of the appellant at the toll plaza.

- F [26] The other witness who ought to have been called by the prosecution as submitted by the appellant was the owner of the motorcycle which the appellant was riding. It was in evidence that the motorcycle was registered in the name of one Mohd Jailani.

- G [27] Yet another person named by the appellant whom the prosecution had failed to call as a witness was Halim, the person who introduced SP4 to the appellant. SP4 had stated in his evidence that his sumber (the informer) had told him that a male Malay by the name of Halim was involved in drug trafficking activities in the Gurun area. SP4 was told by Halim that if SP4 wish to get drugs in much bigger quantity he was told to get in touch with Halim's boss called Let. Halim gave Let's phone number to SP4 and from then on negotiation for the sale and purchase of drugs took place between SP4, the appellant and the informer. So much was the role of Halim. He was not called by the prosecution as a witness. Neither was he offered to the defence. However, DSP Zainuddin and Roslin were offered to the defence and the court was told that the defence required Roslin but in the end never called him as a defence witness.
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- I

[28] In our view, it was not necessary for the prosecution to call everybody involved in the case to prove its case against the appellant. The prosecution has a complete discretion as to the choice of witnesses to be called at the trial. Its duty is to call all material witnesses essential to the unfolding of the narratives of the prosecution case. (See: *Ti Chuee Hiang v. Public Prosecutor* [1995] 3 CLJ 1; [1995] 2 MLJ 433, *Adel Muhammed El Dabbah v. AG for Palestine* [1944] AC 156, *Seneviratne v. R* [1936] 3 All ER 36).

[29] On the invocation of s. 114(g) of the Evidence Act 1950 against the prosecution for its failure to call these witnesses, we wish to reiterate what the authorities have stated, namely that, only failures to call a material witness may attract the invocation of such provision: (*Munusamy Vengadasalam v. Public Prosecutor* [1987] 1 CLJ 250; [1987] CLJ (Rep) 221). In our view the failure of the prosecution to call those named persons does not merit the invocation of the s. 114(g) presumption. The failure to call does not smack of any oblique motive or any suppression or withholding of evidence on the part of the prosecution. Furthermore, those named persons/witnesses were not necessary or essential to the unfolding of the narratives of the prosecution case.

[30] The drawing of adverse inference under s. 114(g) of the Evidence Act 1950 is not a matter of an inflexible rule but depends on the circumstances of each particular case. (*Public Prosecutor v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233). The facts and circumstances of the instant appeal does not in our view give rise to the drawing of such inference against the prosecution.

[31] We will now deal with the issue of non-calling of the informer who was known either as Kak Nor or Kak Na. From the evidence of SP4, it was submitted that the informer played an active role in the whole transaction and he had metamorphosed into a *particeps criminis*. Learned counsel for the appellant was also industrious enough to have presented before us the chronology of events detailing the involvement of Kak Nor/Kak Na as follows:

23.12.2010 at 12.30 pm: SP4 met up with Kak Nor/Kak Na and she informed that she knew one Halim sold drugs;

[pg 52 Record of Appeal]

23.12.2010 at 1.30 pm: SP4 and Kak Nor/Kak Na met Halim. Halim directed SP4 to call Let and the latter agreed to meet.

[pg 52 Record of Appeal]

24.12.2010 at 8.30 pm: SP4 met Let with Kak Nor/Kak Na. They all sat at the same table and started the negotiation.

“Setelah duduk satu meja dengan saya, kami pun berbincang berkenaan dengan bekalan dadah tersebut ... Semasa perbincangan hanya ada saya, sumber dan Let.”

[pg 53 Record of Appeal]

- A During cross-examination, SP4 confirmed that "... sumber juga hadir dan berbincang sekali".

[pg 64 Record of Appeal]

- B 26.12.2010: SP4 met the Kak Na/Kak Nor before heading to the Appellant's house. When they arrived, "Kami pun dipelawa masuk dan kami berbincang tentang urusan jual beli dadah."

[pg 54 Record of Appeal]

- C 22.01.2011 after 1.30 pm, SP4 left the briefing with the raiding team because he needs to be at the designated place together with Kak Na/Kak Nor.

"Saya keluar taklimat kerana saya perlu berada di kawasan Gurun i.e. di Tol itu bersama dengan sumber."

[pg 55 Record of Appeal]

- D During cross examination, SP4 confirmed that he went to the Gurun Tol in a Honda Accord that belongs to Kak Nor/Kak Na.

[pg 61 Record of Appeal]

- E [32] In her reply, the learned DPP submitted that Kak Nor/Kak Na was merely present and was just listening to the conversation between SP4 and the appellant. It is not denied that the informer was together with SP4 and the appellant during all the meetings and discussions that went on between SP4 and the appellant. As on the day of the arrest of the appellant at the Gurun toll plaza, while stating earlier in his examination-in-chief that he has to be with the informer (whom he referred to as sumber) at the toll plaza, SP4 seemed to have qualified himself when during re-examination by the DPP he said that Kak Nor/Kak Na was about two kilometres away. This was after his admission during cross-examination that he went to the toll plaza in a Honda Accord belonging to Kak Nor/Kak Na.

- G [33] The issue is whether the informer whom by now is known as either Kak Nor or Kak Na had changed her status from being of an informer to an agent provocateur and the non-calling by the prosecution has attracted the provision of s. 114(g) of the Evidence Act 1950.

- H [34] It is trite law that whether an informer has changed into an active agent provocateur depends on the facts of each particular case: (*Munusamy v. Public Prosecutor* (*supra*); *Namasiyiam Doraisamy v. Public Prosecutor & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241; [1987] 2 MLJ 336; *Mohd Za'ba Abdul Talib & Anor v. PP* [2013] 4 CLJ 1081; *Wan Yurillhami Wan Yaacob & Anor v. PP* [2010] 1 CLJ 17).

- I [35] At p. 129 of the appeal record, the learned JC had made a finding that the role of Kak Na was only to introduce SP4 to the appellant. Apparently, she relied just on a piece of SP4's evidence which says "sumber duduk sahaja

dan dengar perbincangan ini, saya yang buat tawar menawar dan bila boleh dapat bekalan. Sumber hanya dengar sahaja". The learned JC also made reference and relied on the case of *Samugen Pakri & Ors v. PP* [2012] 1 CLJ 937.

[36] We are inclined to agree with the submissions of learned counsel for the appellant that the learned JC had made a wrong finding of fact based on the evidence before her. She had failed to consider the evidence on the involvement of the informer in its totality and as a whole. Obviously she was relying on the evidence of SP4 as to what happened on 24 December 2010 ie, the first time SP4 was introduced to the appellant by the informer. That piece of evidence from SP4 came only in his re-examination. The learned JC had however totally disregarded the evidence of SP4 on the presence and involvement of the informer subsequent to that date. The evidence shows that SP4 went to the appellant's house with the informer on 26 December 2010 and again the informer was supposed to be with him at the toll plaza which he had changed to being two kilometres away and admitted driving the informer's car to the toll plaza. Clearly the role of the informer was not merely to introduce the appellant to SP4.

[37] As we see it, this issue merits our comment and consideration. Firstly, is the failure of the learned JC to consider the totality of the evidence in deciding the role played by the informer, hence the change of her status from an informer to an agent provocateur and secondly whether she had rightly appreciated the evidence of the defence.

[38] On the first issue, we are of the view that the learned JC had erred in making a finding that the role of the informer was only to introduce SP4 to the accused. This finding is against the evidence proffered in the case. If the role of the informer was only to introduce SP4 to the appellant, she would not have gone the length of being further involved even after about one month later, bearing in mind that the introduction was on 24 December 2010 and on 22 January 2011 she was again supposed to be with SP4 at the toll plaza. To borrow the words of the Federal Court in *Ti Chuee Hiang v. PP* (*supra*), "the informer, having regard to her role was not a mere informer, but had assumed the mantle of an agent provocateur". The informer in the instant case played an active role without whose participation the appellant would have never been caught. Following the same authority, the identity of the informer in this case was no longer a secret, thus she had lost the protection from disclosure of identity accorded to informers under s. 40 of the DDA. Once an informer falls under the category of an agent provocateur, any failure to call him as a witness may attract the adverse presumption under s. 114(g) of the Evidence Act 1950. (*Kamalahassan Latchimanan v. PP* [2008] 4 CLJ 794).

- A [39] Further, we also find that the learned JC's reliance on the case of *Samugen Pakri & Ors v. PP (supra)* cited in her judgment was misplaced. The role of the informer in *Samugen Pakri* states that the informer informed PW2 that there was a person by the name of "Boy" who offered to sell a big quantity of cannabis at a price of RM900 per kilogram. On the instructions of PW2, the informer told "Boy" (who subsequently was identified as the first appellant) that his friend was interested to buy the cannabis. On the next day the informer informed PW2 that "Boy" had agreed to supply 50kg of cannabis at RM45,000 and it was also agreed that delivery of the drugs was to be made on 1 November 2002. On 1 November 2002 at about 10.20pm the informer introduced the first and the second appellants to PW4, the agent provocateur, at Restoran Ayu, Taman Tun Aminah, Skudai. After that the informer left the place. The court concluded that the role of the informer ended after he introduced PW4 to the appellants and he did not play the role of an agent provocateur. As such the non-calling of the informer or failure to offer him to the defence did not attract the adverse presumption under s. 114(g) of the Evidence Act 1950.
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[40] The learned JC had failed to properly appreciate and distinguish the role of the informer in that case with the role of Kak Nor/Kak Na in the instant appeal. She had erroneously relied on the said authority.

- E [41] The erroneous finding of fact made by the learned JC on the role of the informer and her failure to draw an adverse presumption under s. 114(g) of the Evidence Act 1950 is a serious misdirection and merits our intervention. We are always mindful and must give respect to the trial judge on his or her findings of fact and will always be slow to interfere except in clear cases of erroneous findings in the sense of being unsupported by evidence or against the weight of evidence adduced.
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- [42] We say, this is one such case. This is a fit and proper case for appellate intervention. The advantage enjoyed by the learned JC by reason of her having seen and heard the witnesses could not sufficiently explain or justify the conclusion she made. Her Ladyship had not taken proper advantage of her enviable position of having seen and heard the witnesses and such failure has put the matter at large for this court to peruse and dissect the facts and the law based on the appeal records. For this reason alone, we find that it is unsafe to uphold the conviction of the appellant.
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- H [43] The defence of the appellant in this case was that he was introduced by his friend, Abang Halim, a lady named Kak Na. He knew Kak Na since 2010, where Kak Na asked for his assistance to borrow money from his boss (Ah Peng). After some time, Kak Na told him that she was unable to pay the debt within the stipulated time. She promised the appellant that she will pay the debt the following week.
- I

[44] On 22 January 2011 around 11.30am, the appellant called Kak Na asking about the money. Around 2.30pm Kak Na arrived at the appellant's house, along with her, she carried a number of plastic bags. One of the plastic packet given to the appellant contained 'kuih'. The appellant told his wife to prepare drinks and also served Kak Na the 'kuih'. After that, Kak Na gave him RM1,050 as payment for one week and left. Later, at about 2.50pm Kak Na called the appellant and told him that she had left her cream cracker plastic packet on the appellant's wife's motorcycle and requested the appellant to hand over the plastic packet to her at the parking area Gurun toll plaza. The appellant agreed.

[45] At the Gurun toll plaza, the appellant saw Kak Na signalling from her car for him to come near her car and as he neared Kak Na's car, he saw four men in plain clothes running towards him and pushed him down. One of the men introduced himself as a police officer and he was arrested. The appellant claimed he explained to them that he was requested by Kak Na to come to the toll plaza to return the cream cracker plastic packet which belong to Kak Na.

[46] The gist of the appellant's defence is that the informer had framed him up arising from the failure of the informer to pay up her loan to his boss, and that the informer was in her car at the toll plaza.

[47] The learned JC had brushed aside the defence story as hard to believe, that the appellant was not telling the truth and was lying through his teeth. She also found the story to be unbelievable as it was a bare denial.

[48] Having considered the defence story, we do not share the views of the learned JC that the defence was a bare denial. The appellant had given a story which the learned JC found to be unbelievable. In the light of the evidence of SP4 about the informer, was it not probable that the informer was at the toll plaza on the day of the incident? In our view, the appellant's story was not a bare denial. It has been held that where an explanation is given by an accused person which is consistent with innocence, the court must consider whether it might reasonably be true even though the court is not convinced of its truth: (*Osman Khan v. PP* [1948] MLJ 56).

[49] We also note that the learned JC in disbelieving the appellant's story had also drawn a conclusion that the appellant was not telling the truth because of his failure to call certain witnesses. At p. 147 of the appeal record the learned JC had made the following remarks against the appellant:

[80] Based on the above submission, if the explanation is true, the accused should have called Kak Na and the accused's wife to give the evidence in order to create a reasonable doubt against the prosecution's case. At the end of the prosecution's case the learned DPP did offer the accused's wife to the defendant.

- A [81] Apart from these two witnesses, the accused should also call Abang Halim to confirm that Kak Na did borrow RM10,000.00 from Ah Peng. The accused didn't do so even though he knew Abang Halim for the past 30 years and the accused knew his whereabouts. When asked by this honourable court whether he would like to call his wife to corroborate his evidence, the accused choose not to do so even though the charge against
- B the accused carried death penalty. Hence the court can make a conclusion that the accused was not telling the truth in giving the evidence.

- [50] Generally, in a criminal trial there is no burden on an accused person to call witnesses and no adverse inference can be drawn against the defence for failure to call witnesses: (*Goh Ah Yew v. Public Prosecutor* [1948] 1 LNS 13; [1949] MLJ 150; *Abu Bakar v. Regina* [1963] 1 LNS 4; [1963] MLJ 288; *Tan Foo Su v. Public Prosecutor* [1967] 1 LNS 179; [1967] 2 MLJ 19; *Illian & Anor v. Public Prosecutor* [1988] 1 LNS 139; [1988] 1 MLJ 421).
- C

- [51] The learned JC had placed a burden on the appellant and had also drawn adverse conclusions against the appellant for failing to call the witnesses offered by the prosecution. That, in our view is a misdirection. The duty of the trial judge is to consider the defence story and applying the principles laid in *Mat v. Public Prosecutor* [1963] 1 LNS 82; [1963] 1 MLJ 263 and decide whether a reasonable doubt has been created in the prosecution's case.
- D

E **Contradiction In The Witnesses Evidence**

- [52] There is another issue raised by the appellant in this appeal, namely with regard to contradictions in the evidence of the prosecution witnesses. In our view the issue of whether one phone number or two phone numbers supposedly to belong to the appellant as given in the evidence of SP4 and SP5 is really immaterial. So was the question of whether the engine of the motorcycle was still running or not at the time the appellant was arrested is also of no consequence to the prosecution's case. Likewise, whether the drugs were found on the road or in the basket of the motorcycle has been dealt with earlier in our consideration of exh. P14.
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- [53] The learned JC had dealt with the issue of discrepancies in the evidence of the prosecution witnesses and had cited at p. 138 of the appeal record the oft quoted cases of *PP v. Datuk Haji Harun Haji Idris (No. 2)* [1976] 1 LNS 184; [1977] 1 MLJ 15 and *Pie Chin v. Public Prosecutor* [1983] 1 CLJ 316; [1983] CLJ (Rep) 703.
- H

- [54] It would not be out of place to repeat what Shaik Daud JCA had stated in *Andy Bagindah v. PP* [2000] 3 CLJ 289 wherein at p. 292 His Lordship had stated:

- I There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the

trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

[55] We stand guided by those words and we see no reason to interfere with the learned JC's finding on the issue.

[56] In the circumstances of the case, it is our considered view that it is unsafe to uphold the conviction of the appellant. The misdirections committed by the learned JC merits our intervention. The appeal is allowed and we set aside and conviction and sentence imposed by the High Court. The appellant is acquitted and discharged.

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